

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0312

STATE OF MONTANA

Plaintiff and Appellee,

v.

CODY WILLIAM MARBLE,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Fourth Judicial District Court,
Missoula County, the Honorable Douglas G. Harkin, Presiding

APPEARANCES:

COLIN M. STEPHENS
Smith & Stephens, P.C.
315 West Pine
Missoula, MT 59802

ATTORNEY FOR DEFENDANT
AND APPELLANT

STEVE BULLOCK
Montana Attorney General
MARK MATTIOLI
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

FRED VAN VALKENBURG
MISSOULA County Attorney
200 W. Broadway
Missoula, MT 59802

ATTORNEYS FOR
PLAINTIFF AND APPELLEE

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ISSUES PRESENTED

Did attorney Robert Henry provide Defendant-Appellant Cody William Marble (Marble) ineffective assistance of counsel when he failed to file a court-ordered motion challenging the constitutionality of Marble's original conviction, which would have invalidated a subsequent revocation?

Was the district court's failure to conduct a transfer hearing in Marble's initial criminal case plain error?

STATEMENT OF THE CASE AND FACTS

In March 2002, Marble was an inmate at the Missoula County Juvenile Detention Facility. On March 20, 2002, the State filed a Motion and Affidavit For Leave To File Information in district court alleging that on or about March 10, 2002, Marble, himself a juvenile, forced another juvenile inmate to engage in anal sex. (D.C. Doc. 1.) Marble was charged with Sexual Intercourse Without Consent. (*Id.*) The district court granted leave to file the Information in the district court pursuant to Mont Code Ann. § 41-5-206(3). (D.C. Doc. 2.) The district court failed to hold a transfer hearing within 30 days after leave to file the information was granted to determine whether the matter should be transferred back to the youth court as required by Mont Code Ann. § 41-5-206(3). In fact, no

hearing was ever held. The hearing was not waived by Marble or his counsel on the record or in writing as required by law.

A jury found Marble guilty of Sexual Intercourse Without Consent. (D.C. Doc. 168.) Marble was sentenced to 20 years with 15 years suspended. (D.C. Doc. 210.) There was no defense objection, or any mention, concerning the court's failure to hold the mandatory transfer hearing.

On February 2, 2004, Marble filed an appeal with the Montana Supreme Court. Marble's appellate counsel did not discover or argue the fact that Marble was denied the statutorily mandated transfer hearing. The Montana Supreme Court affirmed Marble's conviction on September 12, 2005. *State v. Marble*, 2005 MT 280, 328 Mont. 223, 119 P.3d 88.

On January 18, 2005, Marble was paroled to the Missoula Intensive Supervision Program. (D.C. Doc. 228.) On May 4, 2005, a report of violation was submitted to the Montana Board of Pardons and Parole, and on May 9, 2005, Marble was found in violation of his parole and returned to the Montana State Prison. (*Id.*) On May 29, 2007, Marble was discharged from the Montana State Prison to the suspended portion of his sentence subject to certain probation conditions. (*Id.*)

On October 25, 2007, the State again petitioned to revoke Marble's probation for violating his conditions of probation. (*Id.*) On March 17, 2009, during a re-sentencing hearing, Marble made a statement to the court objecting to the revocation of his suspended sentence on the grounds that the underlying conviction was constitutionally infirm because the district court failed to hold a transfer hearing. (D.C. Doc. 291; 3/17/2009 Tr. at 38-40). After Marble read his objection, the following colloquy transpired:

Marble: Your Honor, I would request this Court entertain this issue and afford this defendant an appropriate common law remedy.

Court: (Addressing Marble's counsel Mr. Henry) Would you like to attach that to a motion you would like to make, Counsel?

Marble: May I approach the bench, Your Honor?

Court: Just give it to your counsel, he can make sure I get it. Counsel, if you'd like to attach that to a motion, I'd be glad to consider it.

Mr. Henry: Okay.

(3/17/2009 Tr. at 40)

The Minute Entry for March 17, 2009, states that:

The Defendant made a statement to the Court and read his objection to not being provided a hearing on his Youth Court cause for due process. The Court directed the Defendant to provide his objection to

his counsel and counsel shall submit it with an accompanying motion to the Court for review.”

(D.C. Doc. 291)

This was the first time that the issue of the district court’s failure to conduct the transfer hearing was ever raised. (3/17/2009 Tr. at 40). Although ordered by the court, Marble’s counsel failed to submit any motion addressing the transfer hearing issue. As such, Marble’s constitutional issues, i.e. the absence of a transfer hearing, were never addressed by the district court.

On March 30, 2009, the district court revoked Marble’s prior sentence for violating probation and re-sentenced Marble to the Montana State Prison for a term of 15 years with 10 suspended. (D.C. Doc. 293). On April 13, 2009, Marble, pro se, filed a Motion To Reconsider Order Revoking Suspended Sentence. (D.C. Doc. 295). In that motion, Marble reiterated his oral objection made in open court on March 17, 2009, concerning the transfer hearing issue. The Motion was never ruled upon by the district court. Marble filed a timely notice of appeal.

SUMMARY OF THE ARGUMENT

Marble appeals from the 2009 revocation of his 2004 conviction of Sexual Intercourse Without Consent. During the revocation proceedings, Marble’s attorney, Robert Henry, was ineffective because he failed to adhere to a court order and his client’s instructions to draft a motion to challenge the

constitutionality of Marble's original conviction. As will be demonstrated, but for Mr. Henry's ineffective assistance of counsel, the district court would have addressed the argument that his initial 2004 conviction was unconstitutional. The district court's failure to hold a transfer hearing violated Marble's constitutional due process rights because Marble was a youth when the original offense occurred, and the district court failed to hold a transfer hearing as required by the Montana Youth Court Act. This structural error rendered Marble's initial conviction invalid. Therefore, analogous to a "fruit of the poisonous tree" argument, since Marble's initial conviction was constitutionally infirm, everything that stemmed from it was likewise invalid.¹ This includes Marble's subsequent incarceration and the violations of his conditions of probation. Had Marble's attorney Robert Henry raised the transfer hearing issue, Marble could have properly brought this issue before the district court. This matter is appropriate for direct appeal because there is sufficient evidence in the record for this court to render a decision. Additionally, this matter is appropriate for plain error review because failing to review the claimed error at issue may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental

¹ The argument presented here has been previously heard by the Montana Supreme Court in Marble's pro se Writ of Habeas Corpus denied at Marble v. Mahoney, 2009 Mont. LEXIS 624 (Mont. Sept. 16, 2009).

fairness of the trial proceedings, or may compromise the integrity of the judicial process.

STANDARD OF REVIEW

To prove an ineffective assistance of counsel claim, the defendant must meet both prongs of the two-prong test established in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under the *Strickland* test, the defendant must show his counsel's performance was deficient and the deficient performance prejudiced him. *Hardin v. Montana*, 2006 MT 272, ¶ 18, 334 Mont. 204, 146 P.3d 746. Claims of ineffective assistance of counsel raise mixed questions of law and fact which is this Court reviews de novo. *State v. Herman*, 2008 MT 187, ¶ 10, 343 Mont. 494, ¶ 10, 188 P.3d 978, ¶ 10.

The Montana Supreme Court may discretionarily review errors that violate a criminal defendant's fundamental Constitutional rights, even if no objection is made at the trial level and notwithstanding the applicability of Mont. Code Ann. § 46-20-701(2). *State v. Godfrey*, 2004 MT 197 ¶ 22; 322 Mont. 254 ¶ 22; 95 P.3d 166 ¶ 22.

ARGUMENT

A. Appellant Was Denied Effective Assistance of Counsel When Mr. Henry Failed to File a Motion Challenging The Constitutionality of Marble's Original Conviction.

The Sixth Amendment of the United States Constitution, as incorporated through the Fourteenth Amendment, and Article II, Section 24, of the Montana Constitution guarantees a person the right to effective assistance of counsel. To evaluate claims of ineffective assistance of counsel, this Court has adopted a two-pronged test. *State v. Koughl*, 2004 MT 243, ¶ 11, 323 Mont. 6, 97 P.3d 1095.

This two-pronged test requires the defendant to establish that (1) counsel's performance fell below an objective standard of reasonableness; and (2) a reasonable probability exists that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Koughl*, ¶ 11. There exists a strong presumption that counsel's performance was based on sound trial strategy that falls within the broad range of reasonable professional conduct. *State v. Hendricks*, 2003 MT 223, ¶ 7, 317 Mont. 177, 75 P.3d 1268 (citations omitted).

This Court is unable to determine whether counsel's actions were unreasonable when the record is silent as to the reasoning behind the allegedly deficient actions. Therefore, the Court distinguishes between record-based and non-record-based claims of ineffective assistance of counsel. *State v. Bateman*, 2004 MT 281, ¶ 23, 323 Mont. 280, 99 P.3d 656. Generally, to determine whether or not the claim is record-based, this Court asks "why" counsel did or did not perform as alleged, and then seeks to answer the question by reference to the

record. *State v. White*, 2001 MT 149, ¶ 20, 306 Mont. 58, 30 P.3d 340. For example, “if counsel fails to object to the admission of evidence, or fails to offer an opening statement, does the record fully explain *why* counsel took the particular course of action?” *State v. Turnsplenty*, 2003 MT 159, ¶ 17, 316 Mont. 275, 70 P.3d 1234.

Only where the record fully explains why counsel took, or failed to take, action in providing a defense for the accused may this Court review the matter on direct appeal. *Id.* If not, the proper action for this Court is to dismiss the direct appeal and allow the defendant to seek relief through a post-conviction hearing. *State v. Upshaw*, 2006 MT 341, ¶ 35, 335 Mont. 162. A post-conviction proceeding is more appropriate because “it permits a further inquiry into whether the particular representation was ineffective.” *Turnsplenty*, ¶ 17.

Sometimes the facts are such that it is unnecessary to ask “why” counsel acted or failed to act because the action is obligatory, and therefore clearly non-tactical. *Kougl*, ¶15. “Then the question is not ‘why’ but ‘whether’ counsel acted, and if so, if counsel acted adequately.” *Kougl*, ¶ 15. Although it is rare for there to be “no plausible justification” for counsel’s conduct, it happens, even in situations that are typically non-record based such as failure to offer a particular

jury instruction or advise a client of his options. *Id.* (citing *State v. White*, 2001 MT 149, ¶¶ 18-19, 306 Mont. 58, 30 P.3d 340). This is such a situation.

Such implausible actions include where defense counsel said during his opening statement that his client would tell the jury “that he is guilty, no doubt, of a partner/family member assault and perhaps felony assault,” but that the jury would still not find his client guilty of attempted deliberate homicide. Defense counsel also said during his closing statement that his client “no doubt” assaulted the victim and “no doubt” pointed a gun at her. *State v. Jefferson*, 2003 MT 90, ¶¶ 45-46, 315 Mont. 146, 69 P.3d 641. This Court noted that while the record did not reveal “any direct evidence” of why counsel made those statements, “there is no plausible justification for counsel’s conduct under these circumstances.” *Jefferson*, ¶¶ 45-46. This was true because counsel’s statement directly contravened the reason his client accepted the risk of a trial. Accordingly, counsel’s statements could not be considered a trial strategy or tactical decision. *Jefferson*, ¶ 50.

Additionally, the Court in *State v. Becker*, 2005 MT 75, 326 Mont. 364, 110 P.3d 1, found trial counsel ineffective for not raising a double jeopardy claim at the trial level. *Becker*, ¶¶ 17-24. The Court stated that “whether counsel intentionally allowed [defendant] to be charged with both offenses or

inadvertently allowed it, counsel's actions so clearly fell below the reasonable range of professional conduct required that there is no possible justification for them and neither an explanation in the record for counsel's actions nor a postconviction hearing to determine counsel's reasons for his actions is necessary." *Becker*, ¶ 43. Review on direct appeal is appropriate where there is no possible tactical reason for defense counsel's failure to act. *See Becker*, ¶ 43; *Kougl*, ¶ 20.

In the instant case, Mr. Henry disregarded a March 17, 2007 court order, as well as his client's express wishes, to file a motion regarding the district court's failure to conduct a transfer hearing pursuant to Mont. Code Ann. § 41-5-206(3) (2001). (3/17/09 Tr. at 40; D.C. Doc. 291). As Marble had raised the issue in writing, Mr. Henry need only have attached a motion to Marble's written argument. As in *Kougl* and *Becker*, there is no plausible justification for Mr. Henry's omission to file the obligatory motion because it is unnecessary to ask why Mr. Henry failed to do so, only whether he did or not. The omission, therefore, fell below the objective standard of reasonableness satisfying the first element of *Strickland*. Further, the error was record-based making it an appropriate issue for direct appeal. (3/17/09 Tr. at 40; D.C. Doc. 291); *See Kougl* and *Becker*.

With respect to the second *Strickland* prong, there was a reasonable probability that but for Mr. Henry's omissions, the result would have been different. *Kougl*, ¶ 11. As shown below, had Mr. Henry filed a motion with Marble's objection there is a reasonable probability that the district court would have found that Marble's underlying conviction was unconstitutional. By extension, everything that followed from the unlawful conviction was equally invalid including the conditions of probation, and the subsequent suspension of Marble's sentence.

Marble's due process rights were violated when the district court failed to hold a transfer hearing. *State v. Butler*, 1999 MT 17, ¶ 32, 294 Mont. 17, ¶ 32, 977 P.2d 1000, ¶ 32. In Montana, a county attorney must file a motion for leave to file an information against a juvenile in district court if the juvenile was 17 years of age when accused of sexual intercourse without consent. Mont. Code Ann. § 41-5-206 (2001). Upon the filing of the information against a juvenile, the district court must grant leave to file the information if it appears from the charging documents there was probable cause that the youth committed the alleged offense. *Id.* Within 30 days after leave is granted, the district court must conduct a hearing to determine whether the matter must be transferred back to the youth court. *Id.*

The hearing is only waived if the youth or the youth's counsel does so in writing or on the record. *Id.*

The failure of a district court to conduct a transfer hearing deprives a youth of due process of law guaranteed under the Fourteenth Amendment to the United States Constitution and Article II Section 17 of the Montana Constitution. *Butler*, ¶ 32.

In *Butler*, the defendant, a youth, was charged in district court with attempted deliberate homicide and attempted robbery. *Butler*, ¶1. The district court found probable cause to believe Butler committed the crimes. *Butler*, ¶4. Under the 1997 version of Mont. Code Ann. § 41-5-206, no transfer hearing was required. *Id.* However, the Montana Supreme Court, relying on *Kent v. United States* (1996), 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84, found that “the district court violated Butler’s right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution when it allowed the prosecution to file an information in District Court pursuant to § 41-5-206, MCA (1997), without first affording Butler a hearing.” The court further explained that the decision to prosecute a youth in district court rather than youth court could mean the difference between detaining a minor defendant until age twenty-five or losing his life. *Id.* Therefore, the decision to transfer a youth to district court is critically

important and warrants a hearing. *Butler*, ¶26. Accordingly, because the Montana Supreme Court found that Butler’s due process rights were violated, this Court reversed and remanded.

Subsequent to *Butler*, the Montana Legislature amended Mont. Code Ann. § 41-5-206 to include in subsection (3) a requirement for a transfer hearing to be held within 30 days after leave is granted. *State v. McKee*, 2006 MT 5 ¶20, 330 Mt. 249 ¶20, 127 P.3d 445 ¶20. The purpose of the hearing is for the district court to “determine whether the matter must be transferred back to the youth court, unless the hearing is waived by the youth or by the youth's counsel in writing or on the record.” *Id.*

In *McKee*, this Court upheld the requirement under the revised § 41-5-206(3) to hold a transfer hearing within 30 days after leave is granted to file informations against youths in district court. *McKee*, ¶20. However, *McKee* did nothing to disturb the holding in *Butler* as it related to the critical importance of transfer hearings, and that a district court’s failure to conduct a transfer hearing results in reversible error. *McKee*, ¶20.

In the instant case, Marble was never afforded a transfer hearing which constitutes reversible error. Marble was still a minor on the date the alleged offense occurred which the jury ultimately found Marble guilty of committing.

(D.C. Doc. 1). The County Attorney was obligated file the information against Marble in district court because Marble was accused of committing sexual intercourse without consent and Marble was aged 17 at the time of the alleged offense. Mont. Code Ann. § 41-5-206 (2001). As such, the County Attorney filed an information against Marble directly in district court. (D.C. Doc. 2). However, Marble was never afforded a transfer hearing as required by subpart (3) of § 41-5-206 (2001). Absent the hearing there was no determination whether the matter should have been transferred back to the youth court as required under the same statute. Furthermore, the hearing was not waived by Marble or the Marble's counsel.

As highlighted in *Butler*, the decision to prosecute Marble in district court rather than youth court could have meant the difference between detaining Marble until age twenty-five or losing his life. *Butler*, ¶ 26. Therefore, the decision to allow Marble's case to remain in district court was critically important and warranted a hearing. *Id.* Accordingly, because the Montana Supreme Court found that Butler's due process rights were violated, it is equally clear that Marble's due process rights were violated by not having a transfer hearing. Thus, Marble was prejudiced by his counsel's failure to raise the transfer hearing issue during the revocation proceedings, meeting the second prong of *Strickland*.

B. The failure of the district court to conduct a transfer hearing was plain error and, therefore, was reversible even absent an objection at trial.

The Montana Supreme Court has recognized that it is its “inherent power and paramount obligation to interpret Montana's Constitution and to protect the various rights set forth in that document.” *State v. Whitehorn*, 2002 MT 54 ¶ 17, 309 Mont. 63 ¶ 17, 50 P.3d 121 (Citing *State v. Finley*, 276 Mont. 126, 137, 915 P.2d 208, 215 (1996)). Under this inherent power and paramount obligation, in *Finley*, this Court held that it may

“discretionarily review claimed errors that implicate a criminal defendant's fundamental constitutional rights, even if no contemporaneous objection is made and notwithstanding the inapplicability of Mont. Code Ann. § 46-20-701(2) criteria, where failing to review the claimed error at issue may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial proceedings, or may compromise the integrity of the judicial process.”

Whitehorn, ¶ 17.

This Court reviews such errors as described in *Finley* under the common law plain error doctrine. In *Whitehorn*, this Court explained that the application of the common law plain error doctrine is applicable "notwithstanding" procedural bars when a criminal defendant's fundamental constitutional rights are at stake.

Whitehorn, ¶ 18.

This Court has applied the common law plain error doctrine in situations other than criminal cases on direct appeal. For example, the Montana Supreme Court has applied the common law plain error rule when reviewing a petition for post conviction relief as in *Finley*, and when reviewing a civil appeal from the denial of a driver's license reinstatement petition. *Whitehorn*, ¶17 (citing *Seyferth v. State*, Dept. of Justice (1996), 277 Mont. 377, 922 P.2d 494). Marble urges that the instant case involves such fundamental constitutional rights, i.e. the due process right to a transfer hearing, as outlined in *Finley* and *Whitehorn*, and therefore, is appropriate for plain error review.

In *State v. Van Kirk*, 2001 MT 184 ¶ 37, 306 Mont. 215, 32 P.3d 735, this Court adopted a two-step analysis to determine whether an alleged error violated a criminal defendant's Constitutional rights sufficiently enough to result in reversible error. The first step in the analysis is an inquiry of whether the claimed error is categorized as "structural" error or "trial" error. *Id.* "Structural" error is that type of error that "affects the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Van Kirk*, ¶ 38. This Court has created a three part test to determine what constitutes structural errors: structural errors are "typically of constitutional dimensions, precede the trial, and undermine the fairness of the entire trial proceeding." *Id.* Consequently, this

Court found that “structural error is presumptively prejudicial and is not subject to harmless error review jurisprudentially or under our harmless error statute found at Mont. Code Ann. § 46-20-701.” *Id.*

Structural error is automatically reversible and requires no additional analysis or review. *Van Kirk*, ¶ 36. Examples of structural error include errors in the jury selection process (*State v. LaMere*, 2000 MT 45, ¶ 39-50, 298 Mont. 358 ¶ 39-50, 2 P.3d 204 ¶ 39-50.); total deprivation of the right to counsel (*Gideon v. Wainwright* (1963), 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799); and lack of an impartial trial judge (*Tumey v. Ohio* (1927), 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749). *Van Kirk*, ¶ 36.

In the instant case, the district court’s failure to conduct the mandatory transfer hearing constituted structural error and is, therefore, automatically reversible under the plain error doctrine. Under the test outlined in *Van Kirk*, the failure to hold a transfer hearing was of constitutional dimensions. As discussed in *Butler*, transfer hearings are “critically important,” and the failure of a district court to conduct such a hearing violates a defendant’s constitutional right to due process of law under the Fourteenth Amendment. *Butler*, ¶ 26. Next, the failure to hold a transfer hearing preceded trial and denied Marble, a youth at the time, the opportunity to be tried in youth court. Finally, the failure to hold the transfer

hearing undermined the fairness of the entire trial proceeding because Marble may have been transferred, tried and sentenced in youth court, rather than be subjected to the harsher standards and sentences in district court. Therefore, the failure to hold the transfer hearing constituted structural error and is automatically reversible.

However, the lack of the transfer hearing was not discovered by Marble's trial attorneys or his appellate counsel. Similarly, Marble's postconviction counsel missed the issue. The issue was also not raised on the appeal from the denial of postconviction relief. Nobody caught this glaring error until Marble himself discovered it and made an oral objection to the revocation proceedings on March 17, 2009. (D.C. Doc. 291; 3/17/2009 Tr. at 38-40). As a result of Mr. Henry's failure to raise the lack of transfer hearing, Marble's due process rights were violated and plain error review is appropriate.

CONCLUSION

Marble's attorney Rob Henry's failure to file Marble's objection to the revocation fell below the objective standard of reasonableness because there was no plausible justification for the omission. Marble was prejudiced because a reasonable probability exists that but for Mr. Henry's unprofessional errors, the result of the revocation would have been different. The failure of the district court

to conduct a transfer hearing was plain error, and therefore, is reversible absent a contemporaneous objection at trial, or a showing of prejudice.

Finally, Marble would add that, while the delay in bringing the plain error from the original proceedings may appear significant, he feels that the failure of anyone to recognize the due process violation which resulted from the failure to hold a transfer hearing was fundamental constitutional error. When the criminal justice system exercises the full weight available on a juvenile, the system must ensure that all of the rules are followed to the letter. That time has passed, or that all previous attorneys missed the issue, should not change the fact that a constitutional violation occurred.

Respectfully submitted this 15th day of April, 2010.

Colin M. Stephens
Smith & Stephens, P.C.
Attorney for the Appellant

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of this Appellant's Opening Brief to be mailed to:

FRED R. VAN VALKENBURG
Missoula County Attorney
200 West Broadway
Missoula, MT 59802

STEVE R. BULLOCK
Montana Attorney General
MARK MATTIOLI
Assistant Attorney General
215 North Sanders
Helena, MT 59620-1401

CODY MARBLE 2044197
Montana State Prison
700 Conley Lake Rd.
Deer Lodge, MT 59722

Dated this ____ day of April, 2010.

Colin M. Stephens
SMITH & STEPHENS, P.C.
Attorney for Defendant and Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that this Appellant's Opening Brief is printed with proportionately-spaced Time New Roman typeface of 14 points; is double spaced except for lengthy quotations or footnotes; and does not exceed 10,000 words, excluding the Table of Contents, the Table of Authorities, Certificate of Service, and Certificate of Compliance, as calculated by my WordPerfect X3 software.

Dated this ____th day of April, 2010.

Colin M. Stephens
SMITH & STEPHENS, P.C.
Attorney for Defendant & Appellant